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Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1088

HENRY A. KISSINGER,

Petitioner,

v.

REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, *et al.*,

Respondents.

HENRY A. KISSINGER,

Petitioner,

v.

MILITARY AUDIT PROJECT, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

APPENDIX

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FREEDOM OF INFORMATION ACT, 5 U.S.C. § 552

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner

be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in

which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(4)(A) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying a uniform schedule of fees applicable to all constituent units of such agency. Such fees shall be limited to reasonable standard charges for document search and duplication and provide for recovery of only the direct costs of such search and duplication. Documents shall be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public.

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction

to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

(D) Except as to cases the court considers of greater importance, proceedings before the district court, as authorized by this subsection, and appeals therefrom, take precedence on the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.

(E) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(F) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Civil Service Commission shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was

primarily responsible for the withholding. The Commission, after investigation and consideration of the evidence submitted, shall submit its findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Commission recommends.

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

(5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(6)(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall—

(i) determine within ten days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

(B) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the reasons for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days. As used in this subparagraph, "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular request—

(i) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(ii) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(iii) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

(C) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made

promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

(b) This section does not apply to matters that are—

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) con-

stitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

(d) On or before March 1 of each calendar year, each agency shall submit a report covering the preceding calendar year to the Speaker of the House of Representatives and President of the Senate for referral to the appropriate committees of the Congress. The report shall include—

(1) the number of determinations made by such agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

(2) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information;

(3) the names and titles or positions of each person responsible for the denial of records requested under this section, and the number of instances of participation for each;

(4) the results of each proceeding conducted pursuant to subsection (a)(4)(F), including a report of the disciplinary action taken against the officer or employee who was primarily responsible for improperly withholding records or an explanation of why disciplinary action was not taken;

(5) a copy of every rule made by such agency regarding this section;

(6) a copy of the fee schedule and the total amount of fees collected by the agency for making records available under this section; and

(7) such other information as indicates efforts to administer fully this section.

The Attorney General shall submit an annual report on or before March 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subsections (a)(4)(E), (F), and (G). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

(e) For purposes of this section, the term "agency" as defined in section 551(1) of this title includes any executive

department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

PRIVACY ACT OF 1974, 5 U.S.C. § 552a

§ 552a. Records maintained on individuals

(a) Definitions. — For purposes of this section —

(1) the term "agency" means agency as defined in section 552(e) of this title;

(2) the term "individual" means a citizen of the United States or an alien lawfully admitted for permanent residence;

(3) the term "maintain" includes maintain, collect, use or disseminate;

(4) the term "record" means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph;

(5) the term "system of records" means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual;

(6) the term "statistical record" means a record in a system of records maintained for statistical research or reporting purposes only and not used in whole or in part in making any determination about an identifiable individual, except as provided by section 8 of title 13; and

(7) the term "routine use" means, with respect to the disclosure of a record, the use of such record for a

purpose which is compatible with the purpose for which it was collected.

* * *

(d) Access to records. — Each agency that maintains a system of records shall —

(1) upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him and upon his request, a person of his own choosing to accompany him, to review the record and have a copy made of all or any portion thereof in a form comprehensible to him, except that the agency may require the individual to furnish a written statement authorizing discussion of that individual's record in the accompanying person's presence;

(2) permit the individual to request amendment of a record pertaining to him and —

(A) not later than 10 days (excluding Saturdays, Sundays, and legal public holidays) after the date of receipt of such request, acknowledge in writing such receipt; and

(B) promptly, either —

(i) make any correction of any portion thereof which the individual believes is not accurate, relevant, timely, or complete; or

(ii) inform the individual of its refusal to amend the record in accordance with his request, the reason for the refusal, the procedures established by the agency for the individual to request a review of that refusal by the head of the agency or an officer designated by the head of the agency, and the name and business address of that official;

(3) permit the individual who disagrees with the refusal of the agency to amend his record to request a review of such refusal, and not later than 30 days (excluding Saturdays, Sundays, and legal public holidays) from the date on which the individual requests such review, complete such review and make a final determination unless, for good cause shown, the head of the agency extends such 30-day period; and if, after his review, the reviewing official also refuses to amend the record in accordance with the request, permit the individual to file with the agency a concise statement setting forth the reasons for his disagreement with the refusal of the agency, and notify the individual of the provisions for judicial review of the reviewing official's determination under subsection (g)(1)(A) of this section;

(4) in any disclosure, containing information about which the individual has filed a statement of disagreement, occurring after the filing of the statement under paragraph (3) of this subsection, clearly note any portion of the record which is disputed and provide copies of the statement and, if the agency deems it appropriate, copies of a concise statement of the reasons of the agency for not making the amendments requested, to persons or other agencies to whom the disputed record has been disclosed; and

(5) nothing in this section shall allow an individual access to any information compiled in reasonable anticipation of a civil action or proceeding.

* * *

(g)(1) Civil remedies — Whenever any agency

(A) makes a determination under subsection (d)(3) of this section not to amend an individual's

record in accordance with his request, or fails to make such review in conformity with that subsection;

(B) refuses to comply with an individual request under subsection (d)(1) of this section;

(C) fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual; or

(D) fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual,

the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

(2)(A) In any suit brought under the provisions of subsection (g)(1)(A) of this section, the court may order the agency to amend the individual's record in accordance with his request or in such other way as the court may direct. In such a case the court shall determine the matter de novo.

(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

(3)(A) In any suit brought under the provisions of subsection (g)(1)(B) of this section, the court may enjoin the

agency from withholding the records and order the production to the complainant of any agency records improperly withheld from him. In such a case the court shall determine the matter de novo, and may examine the contents of any agency records in camera to determine whether the records or any portion thereof may be withheld under any of the exemptions set forth in subsection (k) of this section, and the burden is on the agency to sustain its action.

(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

(4) In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of—

(A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $1,000; and

(B) the costs of the action together with reasonable attorney fees as determined by the court.

(5) An action to enforce any liability created under this section may be brought in the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, without regard to the amount in controversy, within two years from the date on which the cause of action arises, except that where an agency has materially and willfully misrepresented any information required under this section to be disclosed to an individual and the information so

misrepresented is material to establishment of the liability of the agency to the individual under this section, the action may be brought at any time within two years after discovery by the individual of the misrepresentation. Nothing in this section shall be construed to authorize any civil action by reason of any injury sustained as the result of a disclosure of a record prior to September 27, 1975.

FEDERAL RECORDS ACT AND RELATED LAWS
44 U.S.C. §2111, 44 U.S.C. Chapters 29, 31, and 33.

§ 2111. Reports: correction of violations

(a) When the Administrator of General Services considers it necessary, he may obtain reports from Federal agencies on their activities under chapters 21, 25, 27, 29, 31, and 33 of this title.

(b) When the Administrator finds that a provision of chapter 21, 25, 27, 29, 31, or 33 of this title has been or is being violated, he shall inform in writing the head of the agency concerned of the violation and make recommendations for its correction. Unless corrective measures satisfactory to the Administrator are inaugurated within a reasonable time, the Administrator shall submit a written report of the matter to the President and the Congress.

* * *

Chapter 29.—Records Management By Administrator of General Services

§ 2901. Definitions

As used in this chapter, and chapters 21, 25, 27, 31, and 33 of this title —

(1) the term "records" has the meaning given it by section 3301 of this title;

(2) the term "records management" means the planning, controlling, directing, organizing, training, promoting, and other managerial activities involved with respect to records creation, records maintenance and use, and records disposition;

(3) the term "records creation" means the production or reproduction of any record;

(4) the term "records maintenance and use" means any activity involving —

(A) location of records of a Federal agency;

(B) storage, retrieval, and handling of records kept at office file locations by or for a Federal agency;

(C) processing of mail by a Federal agency; or

(D) selection and utilization of equipment and supplies associated with records and copying;

(5) the term "records disposition" means any activity with respect to—

(A) disposal of temporary records no longer necessary for the conduct of business by destruction or donation;

(B) transfer of records to Federal agency storage facilities or records centers;

(C) transfer to the National Archives of the United States of records determined to have sufficient historical or other value to warrant continued preservation; or

(D) transfer of records from one Federal agency to any other Federal agency;

(6) the term "records center" means an establishment maintained and operated by the Administrator or by another Federal agency primarily for the storage, servicing, security and processing of records which need to be preserved for varying periods of time and need not be retained in office equipment or space;

(7) the term "records management study" means an investigation and analysis of any Federal agency records, or records management practices or programs (whether manual or automated), with a view toward

rendering findings and recommendations with respect thereto;

(8) the term "inspection" means reviewing any Federal agency's records or records management practices or programs with respect to effectiveness and compliance with records management laws and making necessary recommendations for correction or improvement of records management;

(9) the term "servicing" means making available for use information in records and other materials in the custody of the Administrator, or in a records center —

(A) by furnishing the records or other materials, or information from them, or copies or reproductions thereof, to any Federal agency for official use, or to the public; or

(B) by making and furnishing authenticated or unauthenticated copies or reproductions of the records or other materials;

(10) the term "unauthenticated copies" means exact copies or reproductions of records or other materials that are not certified as such under seal and that need not be legally accepted as evidence;

(11) the term "National Archives of the United States" means those official records which have been determined by the Archivist of the United States to have sufficient historical or other value to warrant their continued preservation by the Federal Government, and which have been accepted by the Administrator for deposit in his custody;

(12) the term "Administrator" means the Administrator of General Services;

(13) the terms "executive agency" and "Federal

agency" shall have the meanings given such terms by subsections (a) and (b), respectively, of section 3 of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 472(a) and (b)).

§ 2902. Objectives of records management

It is the purpose of this chapter, and chapters 21, 31, and 33 of this title, to require the establishment of standards and procedures to assure efficient and effective records management. Such records management standards and procedures shall seek to implement the following goals:

(1) Accurate and complete documentation of the policies and transactions of the Federal Government.

(2) Control of the quantity and quality of records produced by the Federal Government.

(3) Establishment and maintenance of mechanisms of control with respect to records creation in order to prevent the creation of unnecessary records and with respect to the effective and economical operations of an agency.

(4) Simplification of the activities, systems, and processes of records creation and of records maintenance and use.

(5) Judicious preservation and disposal of records.

(6) Direction of continuing attention on records from their initial creation to their final disposition, with particular emphasis on the prevention of unnecessary Federal paperwork.

(7) Establishment and maintenance of such other systems or techniques as the Administrator considers necessary to carry out the purposes of this chapter and chapters 21, 31, and 33 of this title.

* * *

§ 2904. General responsibilities of Administrator

The Administrator shall provide guidance and assistance to Federal agencies with respect to records creation, records maintenance and use, and records disposition. In providing such guidance and assistance, the Administrator shall have responsibility to—

(1) promote economy and efficiency in the selection and utilization of space, staff, equipment, and supplies for records management;

(2) promulgate standards, procedures, and guidelines with respect to records management and records management studies;

(3) conduct research with respect to the improvement of records management practices and programs;

(4) serve as a clearinghouse for information with respect to records management and as a central source for reference and training materials with respect to records management;

(5) establish such interagency committees and boards as may be necessary to provide an exchange of information among Federal agencies with respect to records management;

(6) disseminate information with respect to technological development in records mangement;

(7) direct the continuing attention of Federal agencies and the Congress on the burden placed on the Federal Government by unnecessary paperwork, and on the need for adequate policies governing records creation, maintenance and use, and disposition;

(8) conduct records management studies and, in his discretion, designate the heads of executive agencies to

conduct records management studies with respect to establishing systems and techniques designed to save time and effort in records management, with particular attention given to standards and procedures governing records creation;

(9) conduct inspections or records management studies which involve a review of the programs and practices of more than one Federal agency and which examine interaction among and relationships between Federal agencies with respect to records and records management; and

(10) report to the Congress and to the Director of the Office of Management and Budget each year, at such time or times as he may deem desirable, on the results of the foregoing activities, including evaluations of responses by Federal agencies to any recommendations resulting from studies or inspections conducted by him.

§ 2905. Establishment of standards for selective retention of records; security measures

The Administrator of General Services shall establish standards for the selective retention of records of continuing value, and assist Federal agencies in applying the standards to records in their custody. He shall notify the head of a Federal agency of any actual, impending, or threatened unlawful removal, defacing, alteration, or destruction of records in the custody of the agency that shall come to his attention, and assist the head of the agency in initiating action through the Attorney General for the recovery of records unlawfully removed and for other redress provided by law.

§ 2906. Inspection of agency records

(a)(1) In carrying out his duties and responsibilities under this chapter, the Administrator of General Services or his designee may inspect the records or the records management practices and programs of any Federal agency solely for the purpose of rendering recommendations for the improvement of records management, practices and programs. Officers and employees of such agencies shall cooperate fully in such inspections, subject to the provisions of paragraphs (2) and (3) of this subsection.

(2) Records, the use of which is restricted by law or for reasons of national security or the public interest, shall be inspected, in accordance with regulations promulgated by the Administrator, subject to the approval of the head of the agency concerned or of the President.

(3) If the Administrator or his designee inspects a record, as provided in this subsection, which is contained in a system of records which is subject to section 552a of title 5, such record shall be—

(A) maintained by the Administrator or his designee as a record contained in a system of records; or

(B) deemed to be a record contained in a system of records for purposes of subsections (b), (c), and (i) of section 552a of title 5.

(b) In conducting the inspection of agency records provided for in subsection (a) of this section, the Administrator or his designee shall, in addition to complying with the provisions of law cited in subsection (a) (3), comply with all other Federal laws and be subject to the sanctions provided therein.

* * *

Chapter 31 — Records Management By Federal Agencies

§ 3101. Records management by agency heads; general duties

The head of each Federal agency shall make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency and designed to furnish the information necessary to protect the legal and financial rights of the Government and of persons directly affected by the agency's activities.

§ 3102. Establishment of program of management

The head of each Federal agency shall establish and maintain an active, continuing program for the economical and efficient management of the records of the agency. The program, among other things, shall provide for

(1) effective controls over the creation and over the maintenance and use of records in the conduct of current business;

(2) cooperation with the Administrator of General Services in applying standards, procedures, and techniques designed to improve the management of records, promote the maintenance and security of records deemed appropriate for preservation, and facilitate the segregation and disposal of records of temporary value; and

(3) compliance with sections 2101-2113, 2501-2507, 2701, 2901-2909, and 3101-3107, of this title and the regulations issued under them.

* * *

§ 3105. Safeguards

The head of each Federal agency shall establish safeguards against the removal or loss of records he determines to be necessary and required by regulations of the Administrator of General Services. Safeguards shall include making it known to officials and employees of the agency —

(1) that records in the custody of the agency are not to be alienated or destroyed except in accordance with sections 3301-3314 of this title, and

(2) the penalties provided by law for the unlawful removal or destruction of records.

§ 3106. Unlawful removal, destruction of records

The head of each Federal agency shall notify the Administrator of General Services of any actual, impending, or threatened unlawful removal, defacing, alteration, or destruction of records in the custody of the agency of which he is the head that shall come to his attention, and with the assistance of the Administrator shall initiate action through the Attorney General for the recovery of records he knows or has reason to believe have been unlawfully removed from his agency, or from another Federal agency whose records have been transferred to his legal custody.

* * *

Chapter 33. — Disposal of Records

§ 3301. Definition of records

As used in this chapter, "records" includes all books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in con-

nection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations or other activities of the Government or because of the informational value of data in them. Library and museum material made or acquired and preserved solely for reference or exhibition purposes, extra copies of documents preserved only for convenience of reference, and stocks of publications and of processed documents are not included.

§ 3302. Regulations covering lists of records for disposal, procedure for disposal, and standards for reproduction

The Administrator of General Services shall promulgate regulations, not inconsistent with this chapter, establishing—

(1) procedures for the compiling and submitting to him of lists and schedules of records proposed for disposal,

(2) procedures for the disposal of records authorized for disposal, and

(3) standards for the reproduction of records by photographic or microphotographic processes with a view to the disposal of the original records.

§ 3303. Lists and schedules of records to be submitted to Administrator of General Services by head of each Government agency

The head of each agency of the United States Government shall submit to the Administrator of General Services, under regulations promulgated as provided by section 3302 of this title—

(1) lists of any records in the custody of the agency that have been photographed or microphotographed under the regulations and that, as a consequence, do

not appear to have sufficient value to warrant their further preservation by the Government;

(2) lists of other records in the custody of the agency not needed by it in the transaction of its current business and that do not appear to have sufficient administrative, legal, research, or other value to warrant their further preservation by the Government; and

(3) schedules proposing the disposal after the lapse of specified periods of time of records of a specified form or character that either have accumulated in the custody of the agency or may accumulate after the submission of the schedules and apparently will not after the lapse of the period specified have sufficient administrative, legal, research, or other value to warrant their further preservation by the Government.

* * *

§ 3314. Procedures for disposal of records exclusive

The procedures prescribed by this chapter are exclusive and records of the United States Government may not be alienated or destroyed except under this chapter.

FEDERAL PROPERTY MANAGEMENT REGULATIONS
41 C.F.R. Part 101-11

Part 101-11—Records Management

§ 101-11.000 Scope of part.

This part prescribes policies and promulgates standards, procedures, and techniques for the economical and efficient management of records of Federal agencies.

Subpart 101-11.1—Federal Records; General

* * *

§ 101-11.102 Agency records management programs.

§ 101-11.102-1 Authority.

Section 506(b) of the Federal Records Act of 1950 (44 U.S.C. 396(b)) requires the head of each Federal agency to establish and maintain an active, continuing program for the economical and efficient management of the records of the agency.

§ 101-11.102-2 Program content.

Agency programs shall, among other things, provide for:

(a) Effective controls over the creation, the organization, maintenance and use, and the disposition of all agency records.

(b) Cooperation with GSA in developing and applying standards, procedures, and techniques designed to improve the management of records, assure the maintenance and security of records of continuing value, and facilitate the segregation and disposal of all records of temporary value.

(c) Compliance with the provisions of the Federal Records Act of 1950 and with the regulations issued thereun-

(d) Compliance with § 101-25.104-2 in connection with the moratorium on the purchase of new filing cabinets.

§ 101-11.102-3 Creation of records.

Adequate records management controls over the creation of agency records shall be instituted to insure that important policies and decisions are adequately recorded; that routine operational paper work is kept to a minimum; and that the accumulation of unnecessary files is prevented. Effective techniques to be applied in this area include the application of systems for the control of correspondence, forms, directives and issuances, and reports; the minimizing of duplicate files; and the disposal without filing of transitory material that has no value for record purposes.

* * *

§ 101-11.103 Agency program evaluation.

§ 101-11.103-1 Authority.

Section 505(c) of the Federal Records Act of 1950 (44 U.S.C. 395(c)) authorizes the Administrator of General Services to inspect or survey, personally or by deputy, the records of any Federal agency, as well as to make surveys of records management and records disposal practices in such agencies.

§ 101-11.103-2 Evaluation by National Archives and Records Service.

Agency programs for controlling the creation, maintenance, and use of current records; for the selective retention of records of continuing value; and for the disposal of noncurrent records will be inspected periodically by the

National Archives and Records Service. The objectives of these inspections are to:

(a) Determine agency compliance with the provisions of the Records Disposal Act and the Federal Records Act of 1950.

(b) Determine agency observance of the regulations set forth in this Subpart 101-11.1.

(c) Evaluate the effectiveness of agency records management programs.

* * *

§ 101-11.202 Adequate and proper documentation.

§ 101-11.202-1 Statutory responsibilities.

(a) Section 505(a) of the Federal Records Act of 1950 (44 U.S.C. 395(a), vests in the Administrator of General Services responsibility for developing and issuing standards to improve the management of records.

(b) Section 506(a) of the Federal Records Act of 1950 (44 U.S.C. 396(a)) requires that the head of each Federal agency "shall cause to be made and preserved records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency and designed to furnish the information necessary to protect the legal and financial rights of the Government and of persons directly affected by the agency's activities."

§ 101-11.202-2 Documentation standards.

To insure that adequate and proper records are made and preserved in the Federal Government, the following documentation standards will apply in each Federal agency:

(a) The record of the transaction of public business by any Federal official or employee is to be complete to the extent required (1) to facilitate informal action by the incumbents

and their successors in office; (2) to make possible a proper scrutiny by the Congress, other duly authorized agencies of the Government, and other persons properly and directly concerned, of the manner in which public business has been discharged; and (3) to protect the financial, legal, and other rights of the Government and of persons affected by the Government's actions.

(b) With particular regard to the formulation and execution of basic Government policy, Federal officials are responsible for incorporating in the records of their agencies all essential information on their major actions. Significant decisions and commitments reached orally (person to person, by telephone, or in conference) should be reduced to writing and included in the record. Minutes should be taken at important board, committee, and staff meetings, and these, together with a copy of the agenda and all documents considered at or resulting from such meetings, should be made a part of the record.

(c) The programs, policies, and procedures of Federal agencies are to be adequately documented in appropriate directives. A record copy of each such directive (including those superseded) will be maintained as a part of the official files.

(d) Papers of a private or nonofficial character which pertain only to an individual's personal affairs that are kept in the office of a Federal official will be clearly designated by him as nonofficial and will at all times be filed separately from the official records of his office. In cases where matters requiring the transaction of official business are received in private personal correspondence, the portion of such correspondence that pertains to official business will be extracted and made a part of the official files (see § 101-11.406-6).

* * *

§ 101-11.203-2 General requirements.

Positive action is to be taken to prevent the making of unnecessary records. Existing and proposed office procedures are to be subject to continuing examination by agency management with a view to determining their effect on recordmaking. Where justified, such procedures will be revised, consolidated, or eliminated to keep recordmaking to a minimum. In addition, the detailed program requirements for correspondence, reports, forms, directives management, and ADP records management set forth in the following sections of this subpart are to be observed.

* * *

§ 101-11.401-3 Formulation of records control schedules.

The following steps shall be taken in the development of records control schedules:

(a) Each Federal agency shall compile and maintain on a current basis a records control schedule for all major groups of records in its custody having importance in terms of content, bulk, or space and equipment occupied. For all newly created Federal agencies such schedules shall be completed within 1 year after creation of the agency.

(b) Schedules shall clearly identify and describe the series of records covered, and shall contain instructions that, when approved, can be readily applied. Schedules must be readily adaptable to use along organizational lines so that each office will have standing instructions for the disposition or retention of records in its custody.

(c) All schedules shall take into account the actual filing arrangements in existence, so that disposition of records can be physically accomplished in the largest blocks possible.

(d) Nonrecord materials, such as extra copies of documents preserved for convenience of reference, stocks of processed documents, preliminary worksheets, and similar

papers that need not be made a matter of record, shall not be incorporated in the official files of the agency. To the maximum extent possible, material not required for record purposes shall be disposed of; it should not be sent to file. In cases where transitory files of such materials are established and maintained in filing equipment, such files shall be controlled by means of instructions in the records control schedule.

(e) Schedules shall be reviewed at least once annually to effect changes necessary to maintain their current status.

* * *

§ 101-11.406-6 Mutilation and Destruction of Records.

(a) The Administrator and the heads of Federal agencies are responsible for preventing the unlawful removal, defacing, alteration, or destruction of records (44 U.S.C. 2905, 3106).

(b) The penalties for the willful and unlawful destruction, damage, or alienation of Federal records are contained in the U.S. Criminal Code (18 U.S.C. 2071).

(c) Private files are not governed by these provisions.

DEPARTMENT OF STATE RECORDS MANAGEMENT RULES 5 Foreign Affairs Manual Part 400

410 General Program

The regulations set forth in this chapter establish the basis for an active, continuing program for the effective and economical management of records within the Department of State and all of its component elements in the United States and abroad, as required by Federal statutes and regulations. As used herein, the term "Department" or "Departmental" covers personnel and records of the Department at Washington, D.C., and its domestic field offices in the United States; and the term "post(s)" covers personnel and records located at posts throughout the world and U.S. missions to international organizations, regardless of their geographical location.

411 Legislation and Regulations

411.1 Federal Records Act of 1950

The Federal Records Act of 1950, as amended (44 U.S.C. 3101-3107), requires the establishment of a records management program. The act also provides that "The head of each Federal agency shall establish safeguards against the removal or loss of records he determines to be necessary and required by regulations of the Administrator of General Services. Safeguards shall include making it known to officials and employees of the agency (1) that records in the custody of the agency are not to be alienated or destroyed except in accordance with the provisions of sections 3301-3314 of this title, and (2) the penalties provided by law for the unlawful removal or destruction of records." The act requires the Administrator of General Services to be notified "of any actual, impending, or threatened unlawful removal, defacing, alteration, or

destruction of records in the custody of the agency. . ." Regulations implementing the provisions of the act regarding removal of records are contained in section 417.

* * *

411.4 Federal Property Management Regulations (Subchapter B, Archives and Records)

The Federal Property Management Regulations, which apply to all Federal agencies, are issued by the General Services Administration. They establish the basic procedures and standards applicable to records and paperwork management. Those which are pertinent to the Department of State and its component elements are incorporated in these regulations.

* * *

413 Program Content

The Department's records management program provides for:

a. Effective controls over the creation, organization, maintenance, use, and disposition of all agency records.

b. Cooperation with GSA in developing and applying standards, procedures, and techniques designed to improve the management of records, assure the maintenance and security of records of continuing value, and facilitate the segregation and disposal of all records of only temporary value.

c. Compliance with the provisions of the Federal Records Act of 1950, as amended, and with the regulations issued thereunder.

d. Compliance with GSA regulations issued in connection with the President's moratorium on the purchase of new file cabinets.

414 Scope and Responsibility

414.1 Records Management Program

The records management program of the Department applies to all records produced, acquired, or maintained throughout the Department and posts. The Foreign Affairs Document and Reference Center (O/FADRC) is responsible for the staff supervision, coordination, and direction of the following functions: files management, records equipment and supplies management, records disposition, forms management (6 FAM 1350), administrative reports management (2 FAM 140, 1230), correspondence management (sections 100 and 200), directives management (2 FAM 1100), and mail flow and procedural studies.

Other functions of O/FADRC include maintenance and operation of the central automated document storage and retrieval system and its predecessor, the central foreign policy file (section 434.1); operating the Records Service Center (FADRC/RSC) (section 444); directing the vital records program (section 460); providing authentications services (2 FAM 1290); and developing standards to assure:

a. Adequate and proper documentation of the Department's activities;

b. Creation of only those records essential to the conduct of current business; and

c. The efficient and economical management of all types of records, including automated data processing records.

* * *

417 Removal of Records

417.1 Legal Restrictions

To implement the legal restrictions against the removal of records by any employee leaving the service of a Federal

agency, as set forth in the Federal Records Act of 1950, as amended (see section 411.1), the following regulations and procedures apply within the Department of State and its component elements:

a. No papers kept in an employee's office that have not been explicitly designated or filed as personal at the time of origin or receipt may be removed from the Department or a post when the employee resigns, transfers to another Federal agency, or is otherwise separated from the Department or the Foreign Service, or at any other time, without the approval of the Director, Foreign Affairs Document and Reference Center.

b. In the case of papers not explicitly designated as personal at the time of origin or receipt, or filed as such, that contain both personal and official matter, the Director, Foreign Affairs Document and Reference Center, may require extracts to be prepared of the official contents for incorporation in the records of the Department or post concerned.

c. Unclassified documents relating to the performance of an employee's official duties may be copied and privately retained by an employee if approved by the Director, Foreign Affairs Document and Reference Center.

417.2 Responsibility of Administrative Office

The administrative section of each Departmental office or bureau and of each post has the responsibility for the following actions:

(1) Reminding officials of the rank of assistant secretary and above, or rank of ambassador, who are about to leave the Department or the Foreign Service, of the laws and regulations pertaining to the removal of records (sections 411 and 417).

(2) Insuring that a JF-4, Security Acknowledgment, executed by each incoming official, and a JF-3, Separation

Statement, executed by each departing official, are filed in the official's personnel folder (see 3 FAM 780).

(3) Suggesting to these departing officials the desirability of consulting with National Archives representatives about depositing personal papers that might be of historical interest in the National Archives or a Presidential archival depository, where specific restrictions may be placed on access to such papers.

* * *

420 Records Creation

421 Legal Requirements

The Federal Records Act of 1950, as amended (44 U.S.C. 3101-3102), requires the head of each Federal agency to (a) assure the making and preserving of records "containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency"; and (b) provide for "effective controls over the creation . . . . of records in the conduct of current business."

422 Control

422.1 Policy

Certain controls over the creation of records are essential to insure that important policies, decisions, and operations are adequately recorded, routine paperwork is kept to a minimum, and the accumulation of unnecessary files is prevented. Standards and techniques for achieving economy and efficiency in the creation of records, including correspondence, reports, forms, and directives, shall be developed in accordance with the general criteria set forth in regulations and handbooks issued by the General Services Administration.

422.2 General Methods and Procedures

The following methods and procedures should be followed by all offices on a continuing basis:

a. Survey of Office Procedures

All existing and proposed office procedures should be subject to continuing examination for their effect on record-keeping. Wherever possible, such procedures should be revised, consolidated, or eliminated to prevent the creation of unnecessary records.

b. Elimination of Duplicate Files

Every bureau, office, and post should take positive action to prevent the establishment of, or to eliminate, duplicate files not required for current operating purposes. Proliferation of individual office working files can be controlled through careful planning at the division or branch level and maximum use of the central foreign policy file and the automated document storage and retrieval system in O/FARDRC.

c. Limitation on Number of Copies

The number of copies of communications and other documents reproduced and distributed should be limited to those required on a strict need-to-know basis. To the extent feasible, control should be exercised over office copying equipment to prevent the reproduction of unnecessary copies. As a general rule, information copies of communications should not be filed with official records but rather maintained in a chronological, post, or other temporary file which is retained for only a short period of time.

422.3 Specialized Programs

There are four types of records which require specialized programs for their control: forms, reports, correspondence, and directives. The regulations and procedures covering

these programs are as follows: forms, 6 FAM 1350; reports, 2 FAM 140; correspondence, 5 FAM 100, 200, and the Correspondence Handbook; and directives, 2 FAM 1100.

423 Documentation

423.1 Adequacy

The recording of activities of officials of the Department of State and all of its component elements should be complete to the extent necessary to (a) facilitate the making of decisions and policies and the taking of actions by the incumbents and their successors in office; (b) fulfill the requirements of Federal statutes; (c) make possible a proper scrutiny, by the Congress and by other duly authorized agencies of the Government, of the manner in which the functions of the Department of State have been discharged; (d) protect the financial, legal, and other rights of the Government and of persons affected by actions of the Department of State; and (e) provide materials for research and historical purposes.

423.2 Types

In connection with the performance of functions assigned to the Department of State, all essential information must be made a part of its documentation. A large portion of this documentation will be in the established communications forms, such as telegrams, airgrams, letters, memorandums, and diplomatic notes. In addition, the following types of transactions and records also constitute official agency documentation:

423.2-1 Oral Transactions

Decisions, commitments, and discussions of any significance which are oral in nature (for example, person-to-person, by telephone, in staff meetings, or in conferences) must be made a matter of record. The information should

be written in the form of aide-memoire, memorandums of conversation, or memorandums to the file.

423.2-2 Treaties, Conventions, and Other International Agreements

The signed originals or certified copies of treaties, conventions, and other international agreements effected by exchanges of diplomatic notes, and also full powers and other documents authorizing signature, resolutions of approval of treaties by the Senate, ratifications, notifications of adherence or approval, proclamations of treaties and other international agreements by the President, protocols of exchange or deposit of ratifications, and notifications of termination are part of the Department's documentation. Also included are original documents of formal negotiations conducted by officials of the Department, delegates to international conferences, or by delegates to international organizations in which the U.S. Government participates.

423.2-3 Committee and Conference Documentation

Decisions and commitments on U.S. foreign policy are reached through participation in Departmental, interdepartmental, and international committees and in U.S. governmental, national, and international conferences and organizations. Committee and conference documentation pertaining to this participation should include agenda and minutes of each meeting; documents considered or presented for consideration; reports and other documents resulting from the meetings; records created by or for Departmental or U.S. Government participation before or during the meetings; and records resulting from the implementation of decisions and commitments.

423.2-4 Position Papers, Briefing Books, and Background Data

Position papers (whether used or not), briefing books, and other background data are part of the documentation of the Department's activities. Each item should indicate clearly the meeting or purpose for which it was prepared. A master copy of each is a part of the Department's records.

423.2-5 Special Missions

Activities of any missions either established by or responsible to the Department or post for carrying out special assignments should be fully documented. This documentation should cover the establishment and functioning of the mission and the implementation of its recommendations.

423.2-6 Regulations, Directives, Delegations, etc.

Programs, policies, and procedures, and organizational changes of the Department of State should be adequately documented in regulations, directives, circulars, delegations of authority, designations, legal opinions, and similar material. A master set of each shall be maintained as a part of the Department's records.

423.2-7 Reports and Studies

Reports and studies prepared by Departmental or post personnel or at the request of the Department or any post for its use are a part of the documentation of its activities. Master sets of all such reports and studies are to be maintained as a part of the Department's records. One copy will be sent to the Document and Reference Division (FADRC/DR) for centralized control.

423.2-8 Drafts and Working Papers

Rough drafts and working papers, such as preliminary notes, do not constitute required documentation unless they form an integral part of the finished document or show changes in policy.

423.2-9 ADP Records

With increasing use of automated data processing techniques, adequate documentation of the following types of ADP records is essential: computer programs, machine readable records, functional and operational flow charts, job specifications, records showing basic coding structure, record layouts, printout plans (formats), and basic run instructions (run books).

430 Organization and Maintenance of Files

431 General Organization

Department and post files consist of three main types: central files; authorized decentralized files; and operating, reference, and working files. It is essential to efficient operation that files be physically located with full consideration given to use, security, space, equipment, content of records, and control.

432 Separation of Personal From Official Records

Papers of a personal character which pertain only to an individual's private affairs and which are kept in the office of a Departmental or post employee are to be clearly designated as personal. They are to be filed separately from the official records of the office at all times. When official policy matters are discussed in personal correspondence, that portion pertaining to functions or activities of the

Department or a post is to be extracted and made a part of the official records. Official-informal letters are official records and as such are subject to the same laws, regulations, and legal restrictions governing their maintenance and disposition as those relating to any official documents. (See section 417 for regulations on removal of records.)

445 Disposal of Records

445.1 Legal Provisions

No official Government records may be destroyed without authorization of the National Archives, as set forth in the Records Disposal Act of July 7, 1943, as amended (44 U.S.C. 3301-3314). The law further provides that the head of each Federal agency is responsible for the preparation of disposal lists and schedules as the basis for obtaining such authorization.

445.2 Authority to Dispose of Records

The Foreign Affairs Document and Reference Center has been assigned responsibility for preparing the necessary disposal lists and schedules for submission to the National Archives for approval. Such schedules and lists are based on a careful survey and evaluation of the records concerned with appropriate consultation and clearance with officials having custody and responsibility for the records. Certain categories of records which are common to many agencies have been scheduled by the General Services Administration and published as "General Records Schedules." These authorizations may be applied to Departmental and post records only upon specific instructions from the Foreign Affairs Document and Reference Center. Information material, working papers, and stock copies of processed documents may be destroyed without formal clearance through the National Archives. To the extent possible, such material should not be incorporated in official files.

NOT TO BE PUBLISHED — SEE LOCAL RULE 8 (f)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-1207 September Term, 1978

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, *et al.* — Civil Action No. 77-0220

v.

CYRUS R. VANCE, Individually and as Secretary of State, *et al.*

HENRY A. KISSINGER, Appellant

No. 78-1208

MILITARY AUDIT PROJECT, *et al.* — Civil Action No. 77-0391

v.

DEPARTMENT OF STATE, *et al.*

HENRY A. KISSINGER, Appellant

No. 78-1315

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, *et al.* — Civil Action No. 77-0220

Appellants

v.

CYRUS R. VANCE, Individually and as Secretary of State, *et al.*

Appeals and Cross-Appeal from the United States District Court for the District of Columbia.

Before: WRIGHT, Chief Judge, LUMBARD,* Senior Circuit Judge, and TAMM, Circuit Judge.

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*Of the Second Circuit, sitting by designation pursuant to 28 U.S.C. § 294(d) (1976).

JUDGMENT

These casues came on to be heard on the record of appeals (Nos. 78-1207 and 78-1208) and cross-appeal (No. 78-1315) from the United States District Court for the District of Columbia and were argued by counsel.

For the reasons stated in the attached memorandum, it is ORDERED and ADJUDGED by this court that the judgments of the District Court appealed from in these causes are hereby affirmed.

Per Curiam

For the Court

/s/ George A. Fisher
George A. Fisher
Clerk

Filed: November 7, 1978

78-1207 *et al.*—Reporters Committee v. Vance

MEMORANDUM

The principal issue presented by this Freedom of Information Act appeal is the ownership and appropriate treatment of transcripts of appellant Kissinger's telephone conversations made when he was National Security Advisor to the President and Secretary of State. The Government defendants below, the present Secretary of State and the Librarian of Congress, did not appeal. Thus a judgment affirming the District Court on the ownership issue may make consideration of most of the other issues Mr. Kissinger raises unnecessary. Nevertheless, we find ourselves in full agreement on all issues with the opinion of the District Court filed December 8, 1977, 442 F.Supp. 383 (D.D.C. 1977), and its orders issued pursuant thereto filed January 25, 1978 and March 2, 1978. Copies of the orders are attached.

The District Court's consideration of that portion of the Reporters Committee's request which sought notes of telephone conversations in which Kissinger participated at the White House prior to his appointment as Secretary of State was apparently truncated because that court was under the impression that the plaintiffs had withdrawn their claim to such documents. Before this court the Reporters Committee cross-appealed from Judge Smith's resolution of this question, arguing that it had never withdrawn its claim and that these records should be produced. We disagree. Even if Judge Smith misinterpreted the Reporters Committee's position as to Mr. Kissinger's White House transcripts, the result he reached in denying their production was proper for the following reasons: (1) The Freedom of Information Act does not extend to those of the President's advisors who are so close to him as to be within the White House rather than the Executive Office of the President (*see* 5 U.S.C. §552(e) (1976); S. Conf. Rep. No.

93-1200, 93d Cong., 2d Sess. 15 (1974); *Nixon v. Sampson*, 389 F.Supp. 107, 145-147 (D.D.C. 1975), *entry of order stayed*, 513 F.2d 430 (D.C. Cir. 1975); *cf. Soucie v. David*, 448 F.2d 1067, 1074-1076 (D.C. Cir. 1971)). (2) The mere relocation of these documents to the State Department without any indication that they were used by that agency does not render them State Department records obtainable via an FOIA request to that department. (3) The speculation that some of these earlier transcripts concerned the affairs of the National Security Council adds nothing to plaintiffs' claim because no FOIA request was made of the Security Council and, as mentioned above, the transfer of the notes to the State Department does not change their character.

Affirmed.

Note: The orders referred to above are found at App. 59a and 63a.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, et al., Plaintiffs	)	Civil Action No. 77-220
v	)	
CYRUS R. VANCE, et al., Defendants	)	
MILITARY AUDIT PROJECT, et al., Plaintiffs	)	Civil Action No. 77-391
v	)	
DEPARTMENT OF STATE, et al., Defendants	)	

OPINION

In these two Freedom of Information Act cases, the Reporters Committee for Freedom of the Press, the American Historical Association, the American Political Science Association, and nine authors and journalists, along with the Military Audit Project, seek access to records, now in the custody of the Library of Congress, of Dr. Henry Kissinger's official telephone conversations during his service as Assistant to the President for National Security Affairs and as Secretary of State. Defendants are the Department of State, Dr. Kissinger, his successor, Cyrus Vance, Librarian of Congress Daniel Boorstin, and Archivist James Rhoads. Motions for Summary Judgment have been filed and argued on behalf of Dr. Kissinger and all plaintiffs.[1]

[1] At argument, the government reported that, while it did not join Dr. Kissinger's motion, it did not oppose it.

Dr. Kissinger served as National Security Adviser from January 20, 1968 until his resignation on November 3, 1975. He assumed office as Secretary of State on September 22, 1973 and remained in that position until the end of the Ford Administration in January, 1977. Thus, for a period of nearly two years, he served in two capacities -- as Secretary of State and as staff adviser to the President.

Throughout Dr. Kissinger's tenure in the Nixon and Ford Administrations, his secretaries, both at the White House and at the State Department, monitored his telephone conversations and took shorthand notes of what was said. Transcriptions of these notes were prepared for Dr. Kissinger and his staff.[2] No distinction was drawn between conversations relating primarily to official government business and those of a more personal nature. All were monitored, transcribed, and the records thereof stored in Dr. Kissinger's office, apart from official agency files.

Prior to leaving office, Dr. Kissinger decided to donate to the United States his personal papers and copies of various official documents relating to his activities while in office. In early 1976 the State Department's Legal Adviser informed Dr. Kissinger that the secretarial notes were not State Department documents but were his own personal papers. This advice was affirmed in writing in a memorandum dated November 11, 1976.

On October 29, 1976, Dr. Kissinger transferred the notes from his State Department office to a vault at the estate of Vice President Nelson Rockefeller in Pocantico Hills, New York. Dr. Kissinger requested Deputy Undersecretary

[2]In the Secretary's own words: "[m]y purpose in causing the notes to be made was to create a rough record of those of my daily telephone conversations to which I or my immediate staff might wish to refer in order to follow up on matters discussed orally." SECOND AFFIDAVIT OF HENRY KISSINGER ¶3. In his supporting papers, Dr. Kissinger reports that only his staff reviewed the notes. He never read them, but kept them as a diary.

Lawrence Eagleburger to review all the telephone records, including those compiled during his service at the White House, and to prepare written extracts of "any significant policy decisions or actions not otherwise reflected in the Department's records".[3] These extracts are now filed at the State Department.[4]

Finally, on December 24, 1976, the notes were deeded to the United States, in the custody of the Library of Congress. Under the terms of the deed, public access to the papers was restricted to Dr. Kissinger and his appointees for twenty-five years or until five years after his death, whichever is later. Thereafter the notes would be available for public inspection with the consent or upon the death of the other party to the conversation. On December 28, 1976, the records were delivered from Pocantico Hills to the Librarian of Congress. Subsequently, defendant Rhoads, citing his responsibility as Archivist of the United States to oversee the preservation of "records of a permanent historical value," requested permission to inspect the notes. By letter dated January 18, 1977, Dr. Kissinger rejected that request.

The Freedom of Information Act grants this Court authority to "enjoin [an] agency from withholding agency records and to order the production of any agency records improperly withheld." 5 U.S.C. §552(a)(4)(B). Dr. Kissinger contends that the Act is inapplicable for three reasons. First, he asserts, the fact that the notes are in the custody of the Library of Congress, which is not subject to the Act,[5]

[3]*Compare* AFFIDAVIT OF MONROE LEIGH ¶15 *with* SECOND AFFIDAVIT OF HENRY KISSINGER ¶13.

[4]Plaintiffs are aware of the existence of these extracts but have not sought access to them under the Freedom of Information Act.

[5]*Compare* 5 U.S.C. §552(e) *with* 2 U.S.C. §132. While the Library of Congress receives executive agency treatment for some purposes, *see, e.g.*, 5 U.S.C. §5596, plaintiffs have conceded that it is not subject to requests for information under FOIA. *See* U.S.C. §551(1)(A).

renders meaningless any court order prohibiting the State Department from withholding documents. He argues that FOIA imposes no obligation upon an agency to gather records no longer in its possession[6] and that, in any event, plaintiffs lack standing under the Federal Records Act to challenge the transfer from the Department.[7]

The Federal Records Act provides the exclusive procedure for disposal of government records, which are defined to include:

> "documentary materials . . . made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or *appropriate for preservation as evidence of* the organization, functions, *policies, decisions,* procedures, operations, or other activities *of the Government* or because of the informational value of data in them." 44 U.S.C. §3301 (emphasis added).

Prior disposal of its records, an agency must submit to the Administrator of General Services a list of those intended for disposal. 44 U.S.C. §3302. Only if the Administrator then determines that the records are no longer appropriate for preservation may they be destroyed. 44 U.S.C. §3303a. When, as here, records have been removed from an agency outside this statutory framework, the agency head must so notify the Administrator and, together with him, initiate

[6] *See Nichols v. United States,* 325 F.Supp. 130 (D.Kan.1971), *aff'd,* 460 F.2d 671 (10th Cir.), *cert. denied,* 409 U.S. 966 (1972); *Ciba-Geigy Corporation v. Matthews,* 428 F.Supp. 523 (S.D.N.Y. 1977). *See also, ATTORNEY GENERAL'S MEMORANDUM ON THE PUBLIC INFORMATION SECTION OF THE ADMINISTRATIVE PROCEDURE ACT* 23-24 (1967).

[7] *See Nichols v. United States,* 460 F.2d 671, 674-75 (10th Cir.), *cert. denied,* 409 U.S. 960 (1972). *See generally, Cort v. Ash,* 422 U.S. 66, 78 (1975).

action through the Attorney General for their recovery. 44 U.S.C. §3106. This, suggests Dr. Kissinger, is plaintiffs' sole remedy.

There is, however, an alternative. Rather than wait for institution of the statutory retrieval action, plaintiffs may first invoke the broad equitable powers granted the district courts in aid of their role as the "enforcement arm" of the Freedom of Information Act. *See Renegotiation Board v. Bannercraft Clothing Co.,* 415 U.S. 1, 19 (1974). *Accord, Nixon v. Sampson,* 389 F. Supp. 107, 121-22 n.34 (D.D.C.), *stayed sub nom. Nixon v. Richey,* 513 F.2d 430 (D.C. Cir. 1975), *dismissed as moot,* (D.D.C. September 21, 1977). The courts may draw on those powers to order the return of wrongfully removed agency documents where a statutory retrieval action appears unlikely.

Secondly, Dr. Kissinger urges that notes of those conversations conducted in his White House capacity cannot be considered "agency records". At oral argument, plaintiffs withdrew their challenge to this position.

Dr. Kissinger's final argument, based on the proposition that creation of the extracts fully satisfied the State Department's record-keeping requirements, is that the notes are personal working papers,[8] not "agency records" and not subject to an FOIA request. He maintains that he considered and treated the notes as personal property from their inception.[9] Circulation was restricted to his immediate

[8] *See* 5 Foreign Affairs Manual [FAM] §432.2-8.

[9] *See* 5 FAM §432, which reads: "Papers of a personal character which pertain only to an individual's private affairs and which are kept in the office of a Departmental or post employee are to be clearly designated as personal. They are to be filed separately from the official records of the office at all times. When official policy matters are discussed in personal correspondence, that portion pertaining to functions or activities of the Department or a post is to be extracted and made a part of the official records." By its terms, the regulation applies exclusively to

staff. The records were stored in filing cabinets in his office.[10] Dr. Kissinger asserts that had he thought that the notes would be determined to be official records, he would have edited them for errors in transcription. Since that would have been a long and arduous process, he would have abandoned the entire project.

State Department regulations require documentation of all official activities in order to "facilitate the making of decisions and policies and the taking of actions" by Department employees and "to provide materials for research and historical purposes." 5 Foreign Affairs Manual [FAM] §423.1. *See* 41 C.F.R. §101-11.202-2(a). This requirement extends to all "decisions, commitments, and discussions of any significance which are oral in nature." 5 FAM §423.2-1. *See* 41 C.F.R. §101-11.202-2(b). Involved here are high-level conversations of the Secretary of State. The significance of the commitments, decisions, and discussions embodied in these conversations is apparent from the stature of the other parties to them (two presidents, heads of state, cabinet officers, diplomats, legislators, scholars, journalists, and others) and is underscored by a Department policy which prohibits monitoring of telephone conversations except when "absolutely essential to the conduct of business."[11] Consequently, under his own regulations, Dr. Kissinger had no alternative but to document the matters discussed in the conversations.

It is a basic rule of copyright law that work created by an employee within the scope of employment is the property of the employer. *See, e.g., Scherr v. Universal Match Corp.*, 417 F.2d 497, 500 (2d Cir. 1969), *cert. denied*, 397 U.S. 936

"[p]apers . . . which pertain only to an individual's private affairs" and to "personal correspondence."

[10] *Id.*

[11] The policy is set forth in an undated letter from the Department's Acting Assistant Secretary for Congressional Relations to former Congresswoman Bella Abzug. *But see* 41 C.F.R. §101-35.308-9(f).

(1970); *Brattleboro Publishing Co. v. Winmill Publishing Corp.*, 369 F.2d 565, 567-68 (2d Cir. 1966). This principle applies equally in the government sphere.

In *First Trust Company of St. Paul v. Minnesota Historical Society*, a federal trial court rejected a government claim to journals compiled by Lieutenant William Clark during his exploration of the Missouri River with Captain Meriwether Lewis. 146 F.Supp. 652 (D.Minn. 1956). The court noted that Captain Lewis, not Lieutenant Clark, had been charged by President Jefferson with the responsibility of creating a log of the expedition. On appeal, the Eighth Circuit framed the issue as follows:

> "If Clark's notes are the written records of a government officer *executed in the discharge of his official duties*, they are public documents and ownership is in the United States." *United States v. First Trust Company of St. Paul*, 251 F.2d 686, 690 (1958) (emphasis added).

On the basis that the diary contained "a great many personal and private notations or letters, details of personal illnesses, social engagements, and other such items as might not be expected to be found in notes of official character or in an official record," the Court concluded that the notes could not be classified as government property. *Id.*

Similarly, in *Public Affairs Associates, Inc. v. Rickover*, this Court held that Admiral Hyman Rickover, not the federal government, was the owner of two speeches authored and delivered by the Admiral. 268 F.Supp. 444 (D.D.C. 1967). Determinative factors in that case were that the speeches had been prepared by Admiral Rickover while not on duty and during his leisure time at home. Both speeches contained his personal views on subjects unrelated to his official responsibilities and were delivered at private functions before private audiences.

Although personal in some respects, Dr. Kissinger's secretarial notes were compiled under circumstances unlike those surrounding the creation of either Lieutenant Clark's journals or Admiral Rickover's speeches. The records in dispute here were produced not only in accordance with Department regulations but also on government time and with the aid of department employees, equipment, materials, and other public resources. Having been prepared and transcribed "in the discharge of his official duties", the notes are property of the United States.[12] The Court further finds that the records were wrongfully removed and should be returned to the State Department.

Plaintiffs' Motions for Summary Judgment will be granted, and defendant Kissinger's Motion for Summary Judgment will be denied. Counsel will submit an appropriate order within ten days.

/s/ John Lewis Smith, Jr.
United States District Judge

December 8, 1977

[12]Dr. Kissinger suggests that the creation of the extracts transformed the original notes from federal records into personal property. Department regulations do not envision such a metamorphosis. Section 432 of the regulations requires extraction of official matter contained in "personal correspondence." *See* note 9, *supra*. It does not permit agency employees to extract personal matter from official correspondence and to then treat the correspondence as personal.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, et al.,	)	
Plaintiffs	)	
v.	)	Civil Action No. 77-0220
CYRUS R. VANCE, et al.,	)	
Defendants	)	
MILITARY AUDIT PROJECT, et al.,	)	
Plaintiffs	)	
v.	)	Civil Action No. 77-0391
DEPARTMENT OF STATE, et al.,	)	
Defendants	)	

ORDER

This cause came on to be heard on motions of the plaintiffs in Nos. 77-0220 and 77-0391 for summary judgment and on cross-motion of defendant Henry A. Kissinger for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure, and the Court having considered the pleadings, affidavits and admissions on file, and having stated its findings of fact and conclusions of law in its Opinion filed on December 8, 1977, it is hereby

ORDERED THAT

1. Defendant Kissinger's cross-motion for summary judgment is denied to the extent that it relates to transcribed secretarial notes which reflect telephone

conversations made in his capacity as Secretary of State, and granted to the extent that it relates to transcribed secretarial notes which reflect telephone conversations made in his capacity as Assistant to the President for National Security Affairs.

2. The motion of plaintiffs in No. 77-0220 for summary judgment is granted to the extent that it relates to transcribed secretarial notes which reflect telephone conversations made by defendant Kissinger in his capacity as Secretary of State, and denied to the extent that it relates to transcribed secretarial notes which reflect telephone conversations made by defendant Kissinger in his capacity as Assistant to the President for National Security Affairs.

3. The motion of plaintiffs in No. 77-0391 is granted to the extent that it relates to transcribed secretarial notes which reflect official telephone conver-secretarial notes which reflect telephone conversations made by defendant Kissinger in his capacity as Secretary of State, and denied to the extent that it relates to any documents other than such transcribed secretarial notes. [sic]

4. As soon as practical after the effective date of this order, defendants Kissinger, Daniel J. Boorstin, Cyrus R. Vance, and the Department of State, or their agents and employees, shall cause the original transcribed secretarial notes, or portions thereof, which reflect conversations made by defendant Kissinger in his capacity as Secretary of State to be transferred to the custody of the Department of State.

5. Upon receipt of the notes transferred pursuant to paragraph 4 above, the Department of State shall determine which of the notes, or portions thereof, are required to be released to plaintiffs pursuant to the Freedom of Information Act, 5 U.S.C. §522.

6. After making the determination required by paragraph 5 above, the Department of State shall make available to defendant Kissinger that portion of the notes

deemed subject to disclosure in order to afford him a reasonable opportunity to apply to this Court for an order restraining disclosure of any such notes which defendant Kissinger believes are exempted from disclosure under 5 U.S.C. §552(b)(6). A similar opportunity shall be afforded to any person who was a party to a conversation which is proposed to be disclosed, provided (a) such person gives the Department of State written notice of his desire to examine such conversation prior to its disclosure; and (b) such notice is received before the disclosure takes place.

7. Upon completion of the procedures set forth in paragraph 6 above, the Department of State shall make available to plaintiffs all notes which are required to be disclosed pursuant to the Freedom of Information Act, subject to any order of this Court entered in response to any application to restrain disclosure made by defendant Kissinger or other persons entitled thereto.

8. The court will retain jurisdiction of this cause for the purpose of adjudicating any disputes which may arise respecting claims of exemption made by defendant Kissinger or other persons identified in paragraph 6 above or by the Department of State.

9. The effectiveness of this judgment and order is suspended for a period of 10 days following the entry thereof to permit any defendant desiring to do so to move for a stay pending appeal, and shall be further suspended pending determination of any such motion or motions.

DATED: *January 25, 1978*

/s/ John Lewis Smith, Jr.
UNITED STATES DISTRICT JUDGE

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, et al., Plaintiffs	)	
v	)	Civil Action No. 77-220
CYRUS R. VANCE, et al., Defendants	)	
MILITARY AUDIT PROJECT, et al., Plaintiffs	)	
v.	)	Civil Action No. 77-391
DEPARTMENT OF STATE, et al., Defendants	)	

ORDER

Upon consideration of defendant Kissinger's motion for stay, the arguments offered in support thereof and the arguments offered in opposition thereto; it is hereby

ORDERED that paragraphs 7 and 8 of the final Order entered herein on January 25, 1978, is hereby stayed and suspended pending a final determination of the merits on appeal; and it is

FURTHER ORDERED that the procedures contemplated by paragraph 6 of such Order do not require any person referred to in such paragraph to make application to the Court for any order restraining disclosure of materials proposed to be disclosed by the Department of State sooner than 60 days following the final determination of all appeals pending herein; and it is

FURTHER ORDERED that, during the pendency of any appeal in this case, the Department of State shall hold the

notes transferred to it pursuant to paragraph 5 of the Court's Order of January 25, 1978, solely for the purposes specified in paragraphs 5 and 6 thereof; that access to such notes shall be limited to State Department records officers specifically designated by it to make the determinations called for by such paragraph 5, to their superiors within the Department with whom consultation is necessary for such purpose and to the Department of Justice attorneys having specific responsibility for the conduct of this litigation; that the Department of State shall maintain a list of all persons having access to the notes and shall make such list available to defendant Kissinger; that, except as provided herein, no person having access to the notes shall reveal the contents thereof to any other person; and that such person shall, before obtaining access to the notes, be furnished with a copy of this Order; and it is

FURTHER ORDERED that the defendant Kissinger shall have access to the notes to the extent permitted by established State Department regulations and policies.

/s/ John Lewis Smith, Jr.
UNITED STATES DISTRICT JUDGE

Dated: March 2, 1978.

DEPARTMENT OF STATE
LEGAL ADVISER
WASHINGTON

November 11, 1976

Limited Official Use

MEMORANDUM TO THE SECRETARY

Legal Status of Transcribed Notes of Your Telephone Conversations

In light of today's story in the *Washington Post* (copy attached), I thought it would be useful if I summarized the advice and opinions I have given over the last eleven months on the question of whether the transcribed secretarial notes of your telephone conversations should be considered as the records of any government agency, or as essentially personal papers that you are entitled to retain when you leave office.

The question first arose last January, when a request was filed under the Freedom of Information Act for some of these papers. At that time, I expressed my opinion that these papers were not "agency records" within the meaning of the Freedom of Information Act. Instead, they had consistently been treated as personal in nature, and there were rights of privacy at issue if telephone conversations between two people had to be disclosed to third parties or to the public. For these reasons, I was of the opinion that these papers were personal rather than agency records.

In February, I raised the Freedom of Information Act questions with the Assistant Attorney General for the

Decontrolled under
5 FAM 900 et seq.
12/22/76 *MS*

Office of Legal Counsel at the Department of Justice. He concurred in my view that the pending Freedom of Information Act requests for the transcribed notes of your telephone conversations could properly be denied on the basis that they were not agency records.

Finally in March, I was called upon to review an appeal of the Department's denial of the initial Freedom of Information Act request for these papers. I advised the Department's Council on Classification Policy that there was "very strong support" for concluding that these papers are not agency records. Incidentally, I gave this advice despite an assumption that some of the transcriptions contained classified material. The Council on Classification Policy reviewed the requested papers and found that they did *not* contain classified information.

Independently of these formal occasions when my legal opinion was sought by bureaus of the Department, I have on several occasions discussed with you my view that you would be entitled to retain the transcribed notes of your telephone conversations when you leave office. The detailed basis for my opinion is the following:

1. The papers have been expressly designated and filed as personal from the time they were originated. Under Department of State regulations (5 FAM 417.1a), a retiring official may retain papers expressly designated or filed as personal from their time of origin or receipt.

2. The papers have not been circulated within any agency, but have been continuously held in your possession and in that of your immediate assistants. They were retained solely at your discretion as work aids to help you recall prior conversations and events. Recent authority support the view that such papers are personal rather than agency records. In *Porter County Chapter* v. *A.E.C.*, 380 F. Supp. 630 (N.D. Ind. 1974), certain handwritten notes and materials of A.E.C. staff members were sought under the Freedom of

Information Act. The Court concluded that since "such materials [were] not circulated to nor used by anyone other than the authors, and [were] discarded or retained at the author's sole discretion for their own individual purposes in their own files," the materials were "personal notes and not agency records." *Id.* at 633. The OMB guidelines on the Privacy Act are in accord. They state that the Privacy Act extends only to records under the control of an agency and not to "uncirculated personal notes, papers and records which are retained or discarded at the author's discretion and over which the agency exercises no control or dominion" — even if such materials are "in the possession of agency employees and used by them in performing official functions." 40 F.R. 28952 (1975).

3. The transcriptions that I reviewed in connection with the Freedom of Information Act requests did not contain any government decisions or policy actions. In the event that other transcriptions should reflect such decisions or actions, it is highly probable that they would have been incorporated in other papers at the time the decisions were implemented — and those latter papers would certainly have become government records. Nevertheless, as a precaution, you should review the papers. If any discussion of a significant government activity or decision is found, an extract or summary of it should be prepared and submitted to the appropriate records officials. This procedure is contemplated in the Department's regulations (5 FAM 432). Although technically these regulations apply only to "personal correspondence" and not to transcribed secretarial notes, the preparation of a summary or extract will assure that government records are complete.

4. There are expectations of privacy when two people have a telephone conversation. Although either party could well make a record of a conversation, one assumes that what was said will be revealed to others only at the discretion of the other party. Treating what was said as a

government or public record would violate these expectations.

5. The fact that the papers were retained for personal use, that they were not required to be prepared, that they have been consistently treated as personal, and that they contain personal and private matter, support the view that they are personal in nature. Similar factors were relied on in *United States v. First Trust Co. of St. Paul*, 251 F.2d 686 (8th Cir. 1958), on reaching a conclusion that private notes made on an official government expedition (the Lewis and Clark expedition) were personal papers and not government property of the United States.

6. The fact that these transcriptions were prepared by government-paid secretaries using government paper and typewriters is not, in my opinion, controlling, in view of the factors discussed in paragraphs 1 through 5 above. Moreover, it is accepted practice that senior officials who must devote extraordinary amounts of time to government duties may make use of government office resources to prepare private correspondence and other personal materials.

7. Whether future judicial decisions concerning the Nixon papers might have some effect on the notes of your telephone conversations cannot yet be determined. But I am of the view that the Presidential Recordings and Materials Preservation Act of 1974 does *not* apply to these transcribed notes because that statute on its fact applies to "the Presidential historical materials of Richard M. Nixon" and not to personal papers of individuals who served under him.

Today's article in the *Washington Post* suggests that a "U.S. court restraining order" in the Nixon papers litigation may apply to the transcribed notes of your telephone conversations. That court order, however, expressly applies only to "defendants" in that litigation and

"their superiors, agents and assigns." *Nixon* v. *Administrator of General Services*, 408 F. Supp. 321, 375 (D.D.C. 1976). Since you do not come within any of these categories, this court order does not apply to the transcribed notes of your telephone conversations.

In summary, it is my opinion that under Department of State regulations and other legal criteria, these particular papers are personal and may be retained by you when you leave office.

Monroe Leigh

Kissinger Hints He's Ready for Talks on His Future

By Don Oberdorfer
Washington Post Staff Writer

One of the world's hot literary properties — Henry A. Kissinger — passed the word yesterday that he plans to meet with "a few people" in the coming weeks about his work after leaving public office.

This announcement, from spokesman Robert L. Funseth, superseded an earlier statement from the Secretary of State that he would consider it "improper" to discuss financial offers while still in government.

Nobody would identify the persons who Kissinger plans to meet about his future. However, friends said Kissinger expects to write a book within the next two or three years, and is exploring a quasi-independent role as an adviser and consultant, possibly combined with an academic appointment.

Kissinger may well go onto corporate boards of directors, according to one friend, but will definitely not take a government post. Those familiar with his thinking said there is

little chance he will accept reported offers to be a television commentator, considering such a post to be beneath the dignity of a former diplomatic wizard.

Former Under Secretary of State Carlyle E. Maw, who was Kissinger's personal lawyer before joining the government, said yesterday he has been accepting "offers, suggestions and proposals" on behalf of Kissinger in recent weeks, but that Kissinger has not yet given them his attention.

Maw confirmed that he received a number of proposals for a book, which is expected to be one of Kissinger's major activities — and a major source of income — in the next several years. However, the lawyer said he had seen no outline and that he does not believe Kissinger has started drafting. Maw, who returned to private law practice last September, denied a published report that Kissinger has named a literary agent.

A New York literary source said the Kissinger memoirs were considered to have potential as "a very big book of our time," though nobody knows what Kissinger would cover in his writings, or how frank or incisive he would be. This source said publishing houses have submitted offers over many months, with no response from agents of Kissinger except to receive the offers.

European publishers are said to be particularly enthusiastic about a Kissinger memoir. A rumor, subsequently denied, swept European literary circles last week that the book was to be put up for auction in London within a few days.

Because of Kissinger's extraordinary importance in the history of the present era and his highly personalized and secretive methods of operation, his files and recollections may be of great importance to his successors in government as well as extremely valuable to historians and the public.

Lawrence S. Eagleburger, Kissinger's executive secretary, said yesterday that the originals of Kissinger's government papers will rest in the files of the State Department or, in the case of papers generated during his tenure as presidential national security affairs assistant, in the White House. As with other retired secretaries of state, access to his State Department documents after his departure from government will be arranged, Eagleburger said.

Eagleburger said extensive "memoranda of conversations" covering talks between Kissinger and foreign and U.S. leaders are part of this official file.

However, he said Kissinger obtained a State Department legal adviser's ruling last January that secretarial notes of his telephone conversations are "personal papers" which may be taken with him when he leaves government.

Some of Kissinger's most important transactions with presidents and foreign leaders are believed to have taken place by telephone. Some private attorneys believe the records of telephone conversations monitored during the Nixon presidency may be covered by the U.S. court restraining order which requires public preservation of the Nixon papers.

According to State Department regulations, no papers which have not been explicitly designated or filed as personal at the time of origin or receipt may be removed when an official resigns.

The line between official records and personal papers is the subject of a memo, awaiting final clearance, which the National Archives and Records Service plans to send within a few days to all government departments.

Rep. Bella Abzug (D—N.Y.) chairman of the subcommittee on government information of the House Government Operations Committee, is reported to be considering

an appeal to have a moratorium on the removal of any papers by departing Ford administration officials until the ownership questions can be resolved and the removal of documents supervised by the National Archives and the subcommittee.

Eagleburger said yesterday he expects Kissinger to be "very conservative" in determining what might be of a personal nature. "If there is a question about it, it will stay here," Eagleburger said.

In all of his dealings with senior Chinese officials in Peking and some of his dealings with Soviet diplomats, Kissinger has departed from the traditional practice of utilizing his own interpreter, relying instead exclusively on interpreters supplied by the other sides. There have been reports that this was done by Kissinger for purposes of keeping dealings secret from the U.S. government bureaucracy and that no other U.S. official could be sure of what was said in some extremely important meetings.

Eagleburger quoted Kissinger yesterday as saying there was always a U.S. note-taker during his Chinese and Soviet conversations. Eagleburger said the use of Chinese rather than American interpreters in Peking was at Chinese insistence.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

(Caption omitted in printing)

SECOND AFFIDAVIT OF HENRY A. KISSINGER

HENRY A. KISSINGER, being duly sworn, deposes and says:

1. I am one of the defendants in the above-captioned actions. This affidavit is given in support of my Cross-Motion for Summary Judgment filed herein, and states facts within my own knowledge.

2. From January 20, 1969, until September 22, 1973, I served in the White House as Assistant to the President for National Security Affairs. From September 22, 1973, until November 3, 1975, I served both as Assistant to the President for National Security Affairs and as Secretary of State. After November 3, 1973, I continued to serve as Secretary of State until January 20, 1977.

3. During the period of my government service, my secretaries generally monitored my telephone conversations and took shorthand notes of what was said. These notes were later transcribed and filed in my personal files; the shorthand notes were not kept. My purpose in causing the notes to be made was to create a rough record of those of my daily telephone conversations to which I or my immediate staff might wish to refer in order to follow up on matters discussed orally. There was nothing unusual about this; many other high-level officials at the White House, the State Department, and other departments of the government have for decades followed the same practice of transcribing telephone conversations and filing them with their private papers.

4. In my case, the notes served as work aids to ease the administrative burdens of my office. For example, my executive secretary checked them periodically in order to prepare my appointments schedule and keep it current. The notes were also read by my Senior Special Assistant so that he could keep abreast of my activities. This saved time, as it enabled him to know whether any matters I had discussed required follow-up or implementation without waiting for me to report the substance of my telephone conversations. The notes had no other function, and were used for no other purposes.

5. The monitoring of my conversations was not limited to discussions of official business, but included most of my conversations without regard to their subject matter or the identity of the other party to the conversation. It was not practical to limit the monitoring to official conversations, because I would not always know the character of a conversation until after it had begun. Thus, the transcribed notes give details of my conversations with friends, journalists, diplomats, government officials, two Presidents, scholars, Congressmen, and other people. Many of these conversations were of a purely personal character; this is true of conversations with diplomats, Congressmen and other government officials as well as conversations with others. Other conversations were of a mixed character, in which discussions of personal and official matters were intermingled. Even formal business conversations would concontain humorous and other personal and non-official remarks.

6. I always regarded the telephone transcripts as work aids which I could retain or discard as I chose as had several of my predecessors and many other officials. They were not filed among the official records of any agency, but were stored along with the rest of my personal papers in personal files located in my office. The notes were not to my

knowledge circulated outside my office, and only I and my immediate personal staff had access to them. I did not edit the notes as they were made, or at any other time. There was no need to do so, because no one other than my immediate staff used them and they could obtain the limited information they needed from the rough notes themselves. Had I believed the telephone transcripts would be treated as official records, I would have been obliged to edit them as they were made in order to assure that the stenographers had understood correctly and that the notes were accurate and complete and in suitable form for filing as official records. Since this would have required a substantial commitment of my time, I probably would have decided the notes were not worth the effort, and thus would not have made them at all.

7. As the end of my term as Secretary of State drew near, I began to make plans for leaving public office. I believed that the papers relating to my years in government should be preserved, and decided to donate them to the United States. I chose the Library of Congress as the custodian of these papers, because I knew it had been used as a depository by many other Secretaries of State.

8. In making this donation, I wanted to include not only my personal papers, but also copies of official State Department records relating to my activities. I believed that such a collection of personal and official papers would provide a unique opportunity for future historians by assembling in one place all the papers relating to my years of association with government.

9. To accomplish this objective, it was necessary to obtain State Department approval to transfer my working files, which contained copies of official documents connected with my activities, to the Library. This approval was required because the State Department's policies do not permit a retiring official to retain copies of classified

documents unless it is satisfied that the documents will be stored in facilities suitable for the receipt of such materials. To satisfy this requirement, it was necessary to secure approval by the Department's Office of Security for the proposed storage facilities at the Library and to establish procedures for review of the working files to assure that they did not contain any original records which should have been filed in the Department's Central Files. The steps taken in meeting these requirements are described in a Donation Procedures Memorandum, dated November 12, 1976, a copy of which is attached hereto.

10. The procedures adopted in connection with transfer of my working files to the Library of Congress did not apply to my personal files, because Department of State regulations presume that papers which were designated and filed as personal from the date of origin or receipt may be removed by a retiring official without further processing. The telephone notes at issue here met this description, because they had originally been part of my personal files transferred from the White House to the State Department and had continued to be maintained in separate personal files during my years at the Department.

11. In addition, I had been advised by the Department's Legal Adviser, Monroe Leigh, that the telephone notes were not records of the State Department, but rather were my personal papers which I would be free to retain when I left office. He first gave me this advice in early 1976, and repeated it in a number of subsequent discussions. Mr. Leigh summarized the substance of that advice in a written memorandum, dated November 11, 1976, a copy of which is attached as Exhibit B to the complaint filed in No. 77-0220 herein.

12. In October 1976, I decided to remove the telephone notes from my office in the State Department. Since I had no suitable place of my own in which to store the notes, I

received permission from then Vice President Rockefeller to place them in a large bank-type vault at his estate in Pocantico Hills, New York. The removal and transfer occurred on October 29, 1976; it was arranged for me by Lawrence M. Eagleburger, at my request.

13. At about the same time, I asked Mr. Eagleburger to review the notes to determine whether extracts should be made of any portion of the notes for inclusion among the Department's official records. I chose Mr. Eagleburger because he had worked with me during most of the time I had been in government, was familiar with my activities, and therefore could identify the portions of the notes appropriate for extracting. My instructions to Mr. Eagleburger were that he should read all the telephone notes, including those from the White House period, and extract everything he believed was necessary in order to comply with the regulations and Mr. Leigh's advice. He subsequently reported to me that the extracts had been made and delivered to the Director of the Department of State Records Center and to the Staff Secretary of the National Security Council.

14. The agreement donating my State Department working files and personal papers from my years at Harvard University to the Library of Congress was executed on or about November 12, 1976. A copy of that agreement is attached as Exhibit A to the complaint filed in No. 77-0220 herein. In mid-December 1976, I decided that the telephone notes should also be part of the Library's collection. I executed a separate agreement relating to this donation on December 24, 1976. A copy of this agreement is attached as Exhibit C to the complaint filed in No. 77-0220 herein.

15. The notes were treated separately in a second agreement because I concluded that the access restrictions stated in the original agreement were not adequate to deal

with the special privacy problems presented by the notes. Many of the notes contained statements made in confidence which the speakers could reasonably assume would not be made public. Some of these statements might affect the reputations of prominent individuals still active in politics or foreign affairs. I believed there was a need to preserve the confidentiality of these conversations until sufficient time had passed to assure that they would be a part of history rather than of contemporary politics. Since it was necessary to protect not only my privacy, but the privacy of the persons with whom I spoke, I decided the second agreement should restrict access to these notes for the lives of *both* parties to the conversations.

16. At about the time the second agreement was signed, I asked Mr. Eagleburger to arrange for transfer of the notes from Pocantico Hills to the Library of Congress. I understand that this transfer was made on December 28, 1976.

17. Since this litigation began, I have had an opportunity to examine the notes. This limited inspection confirms my previous understanding that the notes are rough memoranda which vary considerably in quality according to the skill of the secretary who made them. Although some of the notes appear to be substantially verbatim, many others are only rough approximations of what was said. Quite a few of the notes I saw contained misspelled names, omissions, garbled passages, and outright errors of transcription. Although the notes are useful in refreshing my recollections of particular conversations in which I participated, I do not believe they could be regarded as accurate records of my conversations unless they were first corrected and placed in proper form for filing as records.

18. Future historians, who will have the opportunity of comparing the notes to official records after these records have been declassified, may find the notes useful. However,

I believe it would be highly inappropriate to release them now, when the full historical record of the period is still incomplete, and when many of the participants in the conversations are still active in public life.

HENRY A. KISSINGER

(Jurat omitted in printing)

DEPARTMENT OF STATE

ACTION MEMORANDUM
S/S

November 12, 1976

LIMITED OFFICIAL USE

TO : The Secretary
FROM: M — Lawrence S. Eagleburger

Donation Procedures

Attached (Tab 1) is a proposed Deed of Gift and Agreement, which would be the legal instrument by which the collection of papers from your years in Government and from other periods of your life would be donated to the Library of Congress.

Paragraphs 2 and 3 of the proposed Deed of Gift and Agreement refer to Government review and approval of copies of Government papers that would be included in the collection. If you concur, papers will be reviewed in the Department of State in the following manner:

1. The Director of the Department of State Documents Center (FADRC) will designate up to three FADRC employees to review your Department of State files, which may include some personal papers which were not expressly designated or filed as personal from their time of origin or receipt. This is in accordance with Department regulations (5 FAM 417.1).

2. In reviewing these papers, the FADRC employees will crosscheck all Department documents in your files against the Central Foreign Policy File of the Department and those files retained in the Executive Secretariat, to ensure

that the central file is complete and that the Secretary's files do not include any original or record copies. If a Department record is found in your file that is not present in the central file, the FADRC employees will (a) make a duplicate of the paper, (b) place the duplicate in your files, and (c) take the necessary steps to include the document in the Department's record system. In some cases, certain documents may be temporarily retained in the Executive Secretariat rather than the Department's Central Foreign Policy File.

3. If the FADRC employees locate any paper which they consider to be personal or of a non-record nature, they will simply leave that paper in the file and take no action to include such items in the Department's central records. In the case of any document containing both personal and official matter, an extract of official contents will be prepared for inclusion in the Department's record system. In making determinations between personal, record, and non-record material, FADRC employees will be guided by the Director of FADRC, who will, as need arises, consult with one of your assistants and/or the Department's Legal Adviser in making a final decision. If you so desire, all documents or portions of documents duplicated for the central files can be so annotated on your copy.

4. After the Department's Document Center has completed its review of a file or group of files, it may be delivered to the Libarary of Congress under paragraph 3 of the Deed of Gift and Agreement at Tab 1.

5. Under the Department's regulations (5 FAM 417.1a), you are entitled to retain papers that have been expressly designated or filed as personal from their time of origin or receipt. In accordance with paragraph 3 of the Deed of Gift and Agreement, these personal papers may be transferred to the Library of Congress at any time within three months after the Deed of Gift and Agreement is signed.

6. The Department of State's Office of Security has completed an inspection of the storage facilities at the Library of Congress to be used for the storage of your collection of papers. It has been determined that they satisfy the requirements for storage of all classified or controlled information, provided the Library of Congress takes certain steps with respect to the storage area (see Tab 3). The Library of Congress has undertaken to complete these steps within the coming week. No copies of Government papers will be delivered to the Library until these steps are completed.

7. At the time you resign your position as Secretary of State and leave the Department, you will be required (under 5 FAM 417.2) to sign a Separation Statement, Form JF-3. A copy of the Statement you will be required to sign appears at Tab 2.

As noted below, the procedures discussed in this memorandum, as well as the provisions in the Deed of Gift and Agreement pertaining to the Department of State, have been approved by the Department officers concerned. If you concur, the procedures discussed in this memorandum will be implemented.

Recommendation:

That you concur in the procedures described in this memorandum.

Approve __ Disapprove_____

Attachments:

1. Proposed Deed of Gift and Agreement.

2. Copy of Separation Statement, Form JF-3.

3. Memorandum from the Office of Security concerning the storage area at the Library of Congress.

4. Excerpt of Department of State Regulations.

Clearances:

L — Monroe Leigh

A — John Thomas

A/O/FADRC — Jack Pruden

(Attachments omitted in printing)

DEPARTMENT OF STATE
Washington, D.C. 20020

October 7, 1976

Dear Mrs. Abzug:

Our study has now been completed and the Secretary has asked me to reply to the questions contained in your letter of July 14 on the telephone monitoring practices of the Department of State. Basically, the Department is subject to the Federal Property Management Regulations (FPMR 101-35.308). Your specific questions are answered as follows:

1. Q: Does the agency presently permit monitoring of incoming or outgoing telephone calls? (for the purpose of this inquiry, "Monitoring" includes, but is not limited to, a secretary or any third person listening in on the line, either covertly or overtly.)

A: The Department *prohibits* the monitoring of telephone calls except for the most limited purposes.

1a). Q: For what purpose and under what circumstances does monitoring occur?

A: The only exception to the general prohibition is to permit a third party to listen to the telephone conversations of the senior principal officers of the Department for the purpose of taking notes or making

The Honorable
Bella S. Abzug, Chairwoman,
Government Information and
Individual Rights Subcommittee
House of Representatives

appointments and to improve the general efficiency of operations. This is done only at the express request of the officer — whose calls are those being monitored.

1b.) Q: Do agency employees consent to monitoring of their telephone conversations and, if so, are their consents given in writing?

A: Again, employees' telephone conversations are not monitored; this is prohibited by the Department. In accordance with the provisions of FPMR 101-35.308, monitoring is permitted only when an exception to the general prohibition is deemed absolutely essential to the conduct of business. Only principals have been permitted to have a monitoring device; in such cases the exception has been granted at his own request to monitor his own telephone conversations.

1c.) Q: To what extent are the employees and outside callers aware of the presence of another party on the line?

A: As noted above, monitoring occurs only in the most limited circumstances. In some of these cases, the other party may not be aware that the call was being monitored.

2. Q: Is tape recording of telephone conversations on the agency's lines presently permitted? If so, do any warning or consent requirements accompany or limit this practice?

A: Only in its Operations Center does the Department have equipment for taping telephone conversations. Activation of this equipment is permitted in only two cases: 1) when an incoming caller requests that his conversation be recorded for later transmission to a third party; 2) in the event of a threatening call such as a bomb threat or warning of terrorist attack. The equipment operates without any "beep" or warning device, since it is used only when the calling party has voluntarily requested its use or in instances when criminal activity is suspected.

3. Q: Does the agency take any measures to minimize its listening time to portions of conversations which are relevant to the purposes of the monitor?

A: Monitoring is authorized only when the principal determines that monitoring by the third party is relevant or necessary to the transaction of business.

4. Q: Are there any regulations controlling the agency's telephone monitoring practices? If so, please include a copy with your reply. Is the agency affected by any general regulations issued by the General Services Administration, the Office of Telecommunications Policy, or the Federal Communications Commission? If so, please cite the regulations.

A: As noted above, the Department is subject to the provisions of the Federal Property Management Regulations (FPMR 101-35.308.)

5. Q: Under what statutory authority does the agency monitor the telephone conversations of its employees and outside callers?

A: Once again, the Department does not monitor the telephone conversations of its employees. The limited monitoring of outside calls described in 2 above, of course, is not done pursuant to specific statutory authority but under the general authority of the Department to conduct its business.

6. Q: Does the agency employ any automatic devices which record dialing impulses or observe service quality? Does use of this equipment fall within the agency's definition of telephone monitoring?

A: The Department of State does not have any equipment which records dialing impulses or observes service quality.

7. Q: What does the agency do with information regarding illegal activity which comes into its hands in the course of telephone monitoring for service or supervisory purposes?

A: The Department of State does not monitor telephone calls for service quality or supervisory purposes.

8. Q: Do the agency's practices ever conflict with State or Federal law? Where and when has this occurred? In the event of a conflict between State and Federal law, which law controls the agency?

A: We are not aware of any instance in which the Department's practices have been in conflict with state or federal law.

9. Q: Does AT&T service the agency's monitoring equipment? Does any AT&T policy constrain the agency's monitoring practices? Do you have

any reason to believe that AT&T has ever participated in any independent or outside monitoring of the agency's lines?

A: The small amount of telephone monitoring equipment at the Department is the property of the C&P Telephone Company and was installed and is maintained by their service representatives. The Department of State has agreed in writing to abide by the regulations of the C&P Telephone Company regarding the operation of these devices. These regulations are based upon applicable FCC regulation. The Department is not aware of any monitoring of the agency's lines by AT&T.

10. Q: Does the agency receive requests to monitor pursuant to court order or for national security purposes? How often has this occurred in the past 10 years, and to what extent does the agency comply with these requests?

A: We are not aware of any instance in which the Department has received a request to monitor calls pursuant to court order or for national security purposes.

I hope that these answers are responsive to your questions.

Sincerely yours,

Kempton B. Jenkins
Acting Assistant Secretary
for Congressional Relations